United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

200

No. 21,431

WILLIAM M. BROWN

Appellant

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

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STATEMENT OF THE CASE

On Sunday, October 30, 1966, at approximately 7:30 A. M., the defendant William Michael Brown entered a house in the 1100 block of C Street, S. E., in the District of Columbia, to await the opening of a neighborhood grocery store nearby (Tr. Vol. I, p. 119). A short time thereafter, one Sterling Stokes, the decedent, entered with the purpose to purchase a bottle of whiskey (Tr. Vol. I, p. 34), the illegal sale of which was one of the functions of these premises. Also in the house at this time were one Robert Spriggs, the proprietor of the establishment, and one John Henry, an employee of Spriggs. Outside in his car waited one Robert Raysor, Jr. (Tr. Vol. I, p. 35), who had brought the decedent to the premises and was waiting to take him to Raysor's home to trim some linoleum which had been laid the night before (Tr. Vol. I, pp. 32-33). Stokes had his linoleum knife in his pocket when he entered the house (Tr. Vol. I, pp. 39, 40, 76, 77, 80, 81, 82, 83, 87, 89, 94, 103, 107, 113, 118, 130, 131, 133, 136 and 137).

The witness Spriggs testified that he first saw decedent Stokes in the kitchen (Tr. Vol, I, p. 73), along with defendant Brown and John Henry when he, Spriggs, came out of the bathroom. Stokes appeared in a drunken condition and began to argue with Spriggs over a numbers bet that he claimed to have placed with Spriggs. Spriggs denied the bet and the argument grew more intense.

Spriggs testified on page 76 of Vol. I of the Transcript:

> "So I was standing there in the kitchen trying to back to the wall and so he goes in his pocket and he comes out with this knife and so I back up then and he kept coming towards me and I pushed him and so when I pushed him, Mr. Brown was sitting over there besides the wall and he got up to leave out of the house and so he forgot all about me and he run to Mr. Brown who was standing up like this and so when he gets closer to him, he draws back and that's when Mr. Brown hit him with the pistol."

When Brown hit Stokes with the pistol, it went off at the time of striking, and then it fell from his hand to the floor. He picked up the pistol and put it back in his pocket. (Tr. Vol I, p. 115). Both Raysor and Brown testified that they did not know that Stokes was shot but thought that Stokes was bleeding from being struck (Tr. Vol. I, pp. 37, 84). They picked Stokes up, sat him in a chair and wiped off his face. Raysor was summoned from outside and he came in. He also testified that he did not see any bullet wound. The knife was given to Raysor, and he then drove Stokes home with the assistance of Brown and one Wrice, who did not testify. Stokes was taken to his home and left there with several men who were there. Stokes was subsequently taken to the hospital by means not in evidence. Approximately three weeks later, Stokes was sitting up answering questions and being given therapy to aid his full recovery. Suddenly on November 21, 1966, his condition deteriorated and a call "was asked from the Department of Medicine" (Tr. Vol. I, p. 59). He developed chest pains and

became only semi-responsive. It was the impression of the Medical Department that the decedent had a pulmonary embolism. He was pronounced lifeless at 11:15 A. M. that same date.

The sole available government witness to the homicide, John Robert Spriggs, was called by the District Attorney. Spriggs testified as aforesaid (Tr. Vol. I, p. 76). A prior statement had been taken from Spriggs at Police Headquarters shortly after the incident, which materially differed from his direct testimony at the trial and the later testimony of defendant William Brown. The District Attorney, (although the record does not reflect it), announced surprise during the direct examination of Spriggs, and used the prior statement of Spriggs to impeach and cross-examine him.

During the trial, Deputy District of Columbia Coroner, Linwood L. Rayford, testifying as a qualified medical expert, reported the result of the autopsy. The medical testimony consists of 20 pages, among which are the following statements:

> "The immediate cause of death was a pulmonary embolism" (Tr. Vol. I, p. 56)

* * * * * * * * *

Q. "What is the ultimate cause of death? In your opinion?"

A. "The underlying cause of death was gunshot wound to the head" (Tr. Vol. I, p. 57)

* * * * * * * * *

Q. "Did you remove this clot yourself?

A. "Yes.

Q. "Were you able to identify where it came from?

A. "Not precisely, no.

Q. "It could have been from any place in the body, any place where the blood was available?

A. "No, sir.

Q. "Was it because of its size that you --

A. "The size and shape it came from one of the legs" (Tr. Vol. I, p. 67)

* * * * * * * * *

Q. "Well, what you are saying is that the flow to the heart, the restrictions become less and less as they approach the heart?

A. "Yes.

Q. "So whatever is formed, if it can move at all, will have more freedom of movement on the way to the heart than after it passes through?

A. "Thank you.

Q. "But you could not say where this clot formed?

A. "I say from the size and shape, and it appears to have come from one of the legs.

Q. "From one of the legs?

A. "Yes.

Q. "There were no wounds in this man legs, were there sir?

A. "No, sir.

Q. "Now, why did this clot form, if you know?

A. "I can give you the prevailing theories, sir" (Tr. Vol. I, p. 69)

Subsequent to trial, after conviction for manslaughter, counsel for defendant called the District Attorney who admitted that he

wasn't, in fact, surprised at Spriggs' testimony, and that he had never questioned the sole government witness on the facts of the case prior to trial because, "I didn't want him to spin me". (See Affidavit in Support of Motion for New Trial) Defendant filed a Motion for a New Trial on the Ground of Newly Discovered Evidence, which Motion was denied.

On September 29, 1967, judgment was entered convicting appellant of manslaughter with a sentence of imprisonment of sixteen months to four years.

SUMMARY OF ARGUMENT

I

The verdict of the jury was contrary to the law and the evidence in this case.

II

The evidence showed that the decedent perished due to a pulmonary embolism and hence the verdict and judgment cannot stand.

III

The prosecutor was permitted to cross-examine his own witness contrary to the law established in such cases.

ARGUMENT

I

THE VERDICT WAS CONTRARY TO THE LAW AND EVIDENCE

Appellant denied guilt and went to trial asserting self-defense. At the time decedent was injured, there were three other

persons who witnessed the happenings in the room. Two of these persons were available to testify - the defendant and John Robert Spriggs, a government witness. Spriggs testified that decedent Stokes had come at him with a deadly weapon, to-wit, a knife, and that when appellant got up from his chair to leave, decedent then went for appellant who, in self-defense, struck decedent on the side of the head with a pistol, which gun discharged and then fell on the floor (Tr. Vol. I, p. 89).

Appellant testified that he was under attack when he struck decedent (Tr. Vol. I, pp. 113,114,136,139).

Raysor, a government witness and friend of the decedent, testified that decedent had his knife with him when he went into the premises, and also identified the knife as the property of the decedent (Tr. Vol. I, pp. 39,40).

This is the sum total of the probative evidence of what happened in that room at the time decedent was injured.[1/] Motion for directed verdict of acquittal was made and denied at the close of the Government's case and renewed and denied at the close of all the evidence. Denial of these motions constituted error by the Trial Court.

1/ Strangely enough, the trial court permitted testimony concerning decedent's character and reputation for peace and good order (Tr. Vol. II, pp. 11-26).

II

IT WAS NOT PROVED BEYOND A REASONABLE DOUBT THAT DECEDENT DIED OF A GUNSHOT WOUND

The sole witness presented by the prosecution who testified on the question of cause of death was Dr. Linwood Rayford, Deputy Coroner for the District of Columbia. His relatively brief testimony is found in Volume I of the Transcript, pages 51 through 70.

At page 56, the doctor testified as follows:

> "The immediate cause of death was a pulmonary embolism."

At page 57:

> "The underlying cause of death was the gunshot wound to the head."

At page 59:

> "It was the impression from the Medical Department that the decedent had a pulmonary embolism."

After a curious ruling by the Court on a hypothetical question, the Deputy Coroner admitted that up until the time of the embolism, the decedent was making a normal recovery. Then he made the following significant remarks:

> "The size and shape it came from one of the legs." (Tr. Vol. I, p. 67)

This was followed by this reiteration:

> "I saw from the size and it appears to have come from one of the legs" (Tr. Vol. I, p. 69).

The only suggestion from the replies of this expert witness that

appellant was in any way responsible for the death of the decedent was the naked assertion quoted supra from page 57 of the Transcript. The prosecutor made no attempt to have his witness explain his reasons for making this bald statement, and the record shows no causal connection between the embolism from the leg, lodging in the lung, and the gunshot wound to the head from which decedent was making a recovery.

It seems apparent from this short, and it is believed fair, summary of the prosecution's evidence on cause of death that there was considerably less than proof beyond a reasonable doubt that appellant was responsible for loss of life in this case.

It is familiar law that an accused is not guilty of murder or manslaughter unless his conduct was a cause of death sufficiently direct as to meet the requirements of the criminal as distinguished from tort law. Commonwealth v. Root 403 Pa. 571, 170 A(2d) 310, 82 ALR (2d) 452. An analogous situation would be where a man recovers from a gunshot wound and dies of a heart attack.[2/] Surely a conviction of manslaughter could not be sustained because there is no causal connection between the two afflictions. In this regard, it is pointed out, and should be well noted, that the prosecution had the burden of proof and had every opportunity to show causality

2/ In Hopkins v. United States, 4 U.S. App. D.C. 430, 438 et. seq., the Court ruled that where the wound inflicted was the cause of death, neglect in obtaining proper medical attention would not relieve defendant of criminal responsibility. Thus, the instant case is readily distinguishable from the Hopkins case, and from Judge Holtzoff's 1959 opinion in Hamilton v. United States, 182 F. Supp., holding that there was some direct connection between the injury inflicted and the death of the party. Here, nothing approaching this was ever proved.

between the gunshot wound and the embolism from the leg. Under these circumstances, the Court should have granted appellant's motions at the end of the government's case or at the close of all the evidence.

III

THE PROSECUTOR WAS PERMITTED TO CROSS-EXAMINE HIS OWN WITNESS CONTRARY TO THE LAW ESTABLISHED IN SUCH CASES

Title 14, D.C. Code, 1967 Ed., Section 102, provides:

> "When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause. Before such proof is given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made the statements and if so allowed to explain them."

During the government's case, government witness Spriggs testified that defendant Brown was under attack by decedent Stokes at the time of alleged homicide. Although the record reflects no finding of surprise by the Court, the prosecutor was allowed, over defense objections, to impeach and cross-examine his own witness from a prior statement taken two days after the incident, on October 30, 1966.

Just before use of the prior statement (although not reflected in the record), the Court asked counsel for the government if he was surprised, to which he replied "Yes." There were no further questions by the Court and no finding of surprise. The prior

statement went directly to the prime defense offered by the defendant. The statement (Tr. Vol. I, p. 87) relates a portion of the initial narrative of witness Spriggs, "I pushed him back and then 'Hound' jumped up out of the chair and came at him with a pistol and hit him on the right side of the head and the gun went off." Later Spriggs was asked (Tr. Vol. I, p. 88) about the prior statement:

> "Did Stokes make any threats to Brown?" and answered "No, he was only after me and then Brown jumped up."

The above statements were emphatically denied by the Witness Spriggs during the government's examination (Tr. Vol, I, pp. 89, 95). Of course, at the time this statement was taken, Spriggs, himself was subject to charges (Objections were noted on page 91, Volume I of the Transcript).

The day following the verdict, counsel for defendant called counsel for the government, who admitted he was not surprised and that he had never questioned Spriggs, the government's only witness to the alleged homicide on the facts of the case, "because I didn't want him to spin me." Government counsel told counsel for defendant that he was "institutionally surprised" (See Affidavit in Support of Motion for New Trial).

Thus, there was no finding of surprise by the Court. There was no surprise. The statement controvened the testimony of all witnesses and its use was improper and highly prejudicial to the defendant.[3/]

The leading case in this jurisdiction on surprise is Young v. United States, 94 U.S. App. D.C. 62 (1954), which cites most of the

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3/ The error was conpounded by the use of testimony concerning the statement by Detective Crooke (Tr. Vol. II, pp.11-18)

cases on both "surprise" and "refreshing a witnesses recollection." It is again emphasized here that the prosecutor admitted in his opposition to appellant's Motion for a New Trial that "at no time prior to trial did Spriggs read his statement nor did I go over with him the critical facts of the case concerning the actual killing." In the Young case, page 69 of 94 U. S. App. D.C., the Court had this to say concerning surprise:

> "There was, moreover, no finding that the Government was surprised by the testimony. Under the governing statute such a finding must be made before a party may impeach his own witness."

It is submitted that where a prosecutor has never even questioned the sole eye-witness about the salient facts of an alleged murder prior to trial, he may not be heard to claim surprise after putting that witness on the stand. This is analogous to the master of a vessel heaving Halifax in January for Liverpool without first obtaining a weather report. It is almost unheard of, even in minor civil cases, for counsel to put witnesses on the stand, vouching for their credibility without knowing what their testimony will be. In the case at hand, the prosecutor admitted that he had reason to believe that the witness Sprigg's testimony would differ from his previous statement. Assuming, arguendo, that counsel for prosecution had laid a procedural basis for claiming surprise, he was, in fact, not surprised. The prosecution obviously prepared to try this case, not on the testimony, but on previous statement of Spriggs.

To the same effect as the Young case, supra, is Belton v. United States, 104 U.S. App. D.C. 81, 83 (1958), United States v. Michener, 152 F.(2d) 880, and 3 Wharton, Criminal Evidence, sec. 948 (12 ed. 1955).[4]

CONCLUSION

It is respectfully submitted, in view of the foregoing, that the conviction herein should be reversed.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellant was served by hand on Frank Q. Nebeker, Assistant United States Attorney, United States District Courthouse, Washington, D. C. this 26th day of July, 1968.

JAMES MITCHELL JONES

4/ Hickory v. United States, 151 U. S. 303, 14 S.Ct. 334, 38 L. Ed. 170; 3 Wigmore, Evidence secs. 896-905 (3d ed. 1940)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

No. 22,462

FILED SEP 13 1968

WILLIAM M. BEATTY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

DAVID A. CLARKE, JR.,
Special Assistant
to the United States Attorney.

Cr. No. 1525-66

ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

1) Whether the trial court erred by not granting appellant's motions for judgment of acquittal made at both the close of the Government's case and his case.

2) Whether the evidence was sufficient to support the jury's conclusion that a causal relationship existed between the shooting and the pulmonary embolism which was diagnosed as the immediate cause of Stokes' death.

3) Whether counsel for the Government was properly permitted by the trial judge to impeach his own witness, Robert Spriggs.

This case has not previously been before this Court.

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OTHER REFERENCES

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* Cases chiefly relied upon are marked by an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,431

WILLIAM M. BROWN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The indictment in this case charged appellant with second degree murder (22 D.C. Code § 2403) and assault with a dangerous weapon (22 D.C. Code § 502).[1] Appellant entered a plea of not guilty to both counts. A jury trial was held and appellant was convicted of manslaughter and sentenced to 16 months to four years imprisonment.

The relevant facts relating to the crime show that at approximately 7:30 a.m. on the morning of October 30,

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[1] The count charging assault with a dangerous weapon was dismissed.

1966, Robert Raysor and Sterling Stokes, decedent, were on their way to Raysor's house to finish some linoleum work they had begun the previous day (I. Tr. 32, 33).[2] Stokes had been drinking but did not appear to be drunk. His speech and motor abilities were normal (I. Tr. 33, 34). On the way, Stokes said that he wanted to stop at 1104 C Street to pick up a bottle of liquor (I. Tr. 34). Raysor waited in the car while Stokes went inside. Several persons were inside the house when Stokes entered—Robert Spriggs, proprietor, John Henry, employee of Spriggs, and William Brown,[3] appellant (I. Tr. 72, 73). In the course of conversation an argument developed between Stokes and Spriggs concerning a numbers bet (I. Tr. 128). As the argument grew more intense Spriggs pushed Stokes, who then drew a hook-billed linoleum knife from his pocket and approached Spriggs (I. Tr. 130-133).[4] Appellant Brown jumped out of his chair and struck Stokes on the right side of the head with a pistol he had in his pocket.[5] The pistol discharged causing a bullet to enter Stokes' brain (I. Tr. 136-141). The pistol which had fallen to the floor was quickly retrieved by appellant and taken to a nearby house and hidden in the attic (I. Tr. 143-144).

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[2] Volume I of the trial transcript is identified as "I. Tr.".

[3] Alias "D.C. Hound".

[4] The testimony of Spriggs and appellant Brown conflicts as to whether Stokes drew the knife prior to being pushed by Spriggs or subsequent thereto (I. Tr. 76, 130-133). Nevertheless, Spriggs was not in fear of his life (I. Tr. 81).

[5] At trial, Spriggs testified that appellant struck Stokes on the left side of the head after being menaced with the knife (I. Tr. 82, 83). The Government impeached his testimony with his prior inconsistent statement given on November 1, 1966—

> "I pushed him back and then Hound jumped up out of the chair and came at him with a pistol and hit him on the right side of the head and the gun went off."
>
> Q. "Did Stokes make any threats to Brown?"
>
> A. "No, he was only after me and then Brown jumped up."

All of the witnesses testified at trial that they did not know Stokes had been shot but thought that he was bleeding from being struck on the head (I. Tr. 37, 84). They picked Stokes up, sat him in a chair, and wiped off his face. Raysor was called in from outside and given Stokes' knife. Then, along with appellant and one Nathanial Wrice, Raysor drove decedent to his home. Stokes was subsequently taken to a hospital where he received treatment for his wound. He died on November 21, 1966. The immediate cause of death was diagnosed as a pulmonary embolism, the underlying cause of death was the gunshot wound (I. Tr. 56, 57).

ARGUMENT

I. The trial judge properly submitted the issue of appellant's guilt to the jury.

(I. Tr. 21, 29, 31, 33, 34, 74, 76-99, 110-118, 135-147; II. Tr. 38)

Appellant argues that it was error for the court to submit the case to the jury because Spriggs, the only Government witness present when the homicide took place, substantiated appellant's claim of self-defense when he testified that appellant struck Stokes only after being menaced with a linoleum knife. The jury, however, was not required to accept Spriggs' testimony at face value.[6] As trier of the facts, it could accept or reject any or all of Spriggs' testimony and draw whatever reasonable inferences it wished from all the evidence presented at trial.

Spriggs testified that Stokes came into his place drunk and staggering, started an argument, pulled out a linoleum knife, and attacked him first and then appellant (I. Tr. 76, 77). He went on to testify that when he saw Stokes with the linoleum knife he easily pushed him away and was not in fear of his life (I. Tr. 81). According to

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[6] Spriggs and appellant had known each other for several years prior to the shooting (I. Tr. 74). The jury, of course, could take this into account in considering Spriggs' testimony.

Spriggs' direct testimony, appellant, who had been sitting off to one side of the room, jumped up to leave but in order to do so had to pass between Stokes and Spriggs. When appellant got between the two combatants he was attacked by Stokes. Appellant pulled out his pistol and struck Stokes on the left side of the head, the pistol discharging on impact.

There was evidence which tended to contradict Spriggs' version of the shooting incident. Indeed, Spriggs himself was impeached with a statement he had given the police two days after the shooting. Spriggs had told a police officer that Stokes had not threatened appellant and that appellant merely jumped out of his chair and struck Stokes on the left side of the head with his pistol. But this aside, we note that Raysor testified that when he drove Stokes over to Spriggs' place, he could smell liquor on his breath but he did not appear to be drunk (I. Tr. 33, 34). Also, Dr. Rayford testified that Stokes was shot in the right side of the head, the bullet entering Stokes' brain from the right to the left at a slightly downward angle. From this evidence, the jury could have inferred that Stokes was shot at point blank range with a pistol pointed directly at his head, and not as the result of the pistol discharging upon impact when appellant struck Stokes with it. Although appellant testified that he had no idea that Stokes had been shot, the jury could have rejected this testimony because it was completely inconsistent with appellant's act of immediately picking up the pistol and taking it to a nearby house where he hid it in the attic. We note further that appellant is a powerfully built man in his twenties (II. Tr. 38), that Spriggs is 6′1″ and weighed 240 pounds (I. Tr. 77, 80; II. Tr. 38), while Stokes was only 5′9″, weighed 150 pounds and was approximately 60 years old (I. Tr. 77, 31). Moreover, there was testimony that Stokes had a reputation in the community for peace and good order (I. Tr. 21, 22, 29).

On the basis of all the evidence, the jury could have reasonably inferred, contrary to the testimony of Spriggs

and appellant, (1) that Stokes was not the aggressor; or (2) even if he was the aggressor, appellant used excessive force in repelling him; or (3) Stokes was not shot as a result of the pistol discharging when appellant struck him, but Stokes was shot at point blank range in a deliberate act calculated to cause serious bodily harm or death.

Viewing the evidence and its reasonable inferences in a light most favorable to the Government, the trial judge properly submitted the issue of appellant's guilt of manslaughter to the jury.[7] *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947); *Crawford* v. *United States*, 126 U.S. App. D.C. 156, 375 F.2d 332 (1967).

II. The evidence was such that the jury could conclude that the gunshot wound initiated the chain of events that led to Stokes' death.

(I. Tr. 51-70)

Dr. Linwood Rayford, deputy coroner for the District of Columbia, testified to the following: Stokes had been shot in the head with a .22 caliber bullet; the largest fragment of the bullet lodging some 3 or 4 inches inside the brain (I. Tr. 55). Shortly after Stokes had arrived at the hospital doctors performed a brain operation but were unable to remove all of the bullet fragments. Stokes was hospitalized, during which time doctors learned that the left side of his body was paralyzed (I. Tr. 57-58). He remained hospitalized until November 21, 1966 when he developed a pulmonary embolism[8] and died (I. Tr. 59).

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[7] We do not address ourselves directly to the issue of whether it was proper to submit the charge of second degree murder to the jury, since the jury returned a verdict on the charge of manslaughter. See *Howard* v. *United States*, —— U.S. App. D.C. ——, 389 F.2d 281 (1967); *Evans* v. *United States*, No. 20,480, decided May 8, 1968. However, the facts and reasonable inferences were such that the issue of appellant's guilt of second degree murder was properly submitted to the jury.

[8] The doctor defined pulmonary embolism as a blood clot lodging in the pulmonary artery cutting off the blood supply from the heart to the lungs (I. Tr. 55).

The doctor went on establish the causal relationship between the shooting and the pulmonary embolism. He testified that although the immediate cause of death was the pulmonary embolism (I. Tr. 56), the underlying cause of death was the gunshot wound to the head (I. Tr. 57). He also stated that blood clots are not rare and occur occasionally during post-operative treatment (I. Tr. 60).

It is a well established rule of law that if a person strikes a blow that may not be mortal in and of itself but thereby starts a chain of causation that leads to death, he is guilty of homicide.[9] *Hamilton* v. *United States*, 182 F. Supp. 548 (D.C.D.C. 1960); *United States* v. *Woods*, 4 Cranch, C.C. 484, Fed. CAS, No. 16,760 (1834); Hales, *Pleas of the Crown*, Vol. 1, p. 427.

From the doctor's uncontradicted testimony, the jury could have concluded that when appellant shot Stokes he set in motion the chain of events[10] that led to Stokes' death.

III. The trial judge properly permitted the Government attorney to impeach his witness after being surprised by the witness' testimony.

(I. Tr. 81-98)

Appellant contends that the Government's impeachment of its own witness, Spriggs, was improper because there was no formal finding of surprise by the court[11] (Appel-

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[9] And this is true even where the deceased contributes to his own death or hastens it by failing to take proper treatment. *Hopkins* v. *United States*, 4 App. D.C. 430 (1896).

[10] Brain operation, hospitalization, paralyzation, and pulmonary embolism.

[11] Appellant bases his argument on 14 D.C. Code § 102 and the following three cases: *Young* v. *United States*, 94 App. D.C. 62, 214 F.2d 232 (1954) wherein the Government attorney did not claim surprise; *Belton* v. *United States*, 104 U.S. App. D.C. 81, 259 F.2d 811 (1958) wherein the court considered counsel's assertion of surprise and ruled that he was not surprised; *United States* v. *Michener*, 152 F.2d 880 (3 C.C.A. 1954) wherein counsel asserted surprise and impeached his own witness.

lant's Brief, p. 7). However, the statute on which appellant relies, 14 D.C. Code § 102, is not cast in terms of formal findings. *Bartley* v. *United States*, 115 U.S. App. D.C. 310, 319 F.2d 717 (1963). It only requires that the judge, at the time surprise is asserted, be satisfied that surprise had occurred. *Bartley* v. *United States, supra.*

The record in this case reflects a finding of surprise by the trial judge. Midway through the testimony of witness Spriggs, the Government attorney had the witness' prior inconsistent statement marked for identification (I. Tr. 85). The jury was excused and the statement was read to the witness with the judge's permission.[12] (I. Tr. 86)

Following the reading of the statement, appellant's counsel below asked the judge

> "I take it that his statement is not admissible is that right, Your Honor?" (I. Tr. 89-A)

The judge replied

> "That is correct. If he announces surprise, you can certainly examine with reference to it." [13] (I. Tr. 89-A)

The judge then informed both attorneys that he would give a modified version of jury instruction No. 20 as soon as the impeaching testimony was completed (I. Tr. 90). Whereupon the jury was recalled, the witness impeached, and the cautionary instruction given.[14] (I. Tr. 90-97).

This sequence of events strongly suggests that the trial judge recognized the Government attorney's assertion of

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[12] Indicating his knowledge and acquiescence to counsel's impeachment plan.

[13] Here the judge states that the Government attorney announced surprise.

[14] The judge instructed the jury that the prior inconsistent statement of the witness could only be considered to evaluate his credibility and not to establish the truth of any facts contained in the statement (I. Tr. 97-98). See *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 166, 211 F.2d 19, 26 (1953), *cert. denied*, 347 U.S. 1019, wherein a similar jury instruction was held proper and necessary.

surprise, was satisfied that he had been surprised, and ruled in favor of allowing him to impeach his witness even though the ruling does not formally appear in the record.

Appellant also contends that since Government counsel below did not interview Spriggs prior to trial, he should have been barred from claiming surprise after Spriggs took the stand.

The record gives no indication of whether Spriggs was or was not interviewed prior to trial. However, it appears that Government counsel had no reason to interview him. Counsel already had Spriggs' signed statement prepared the day after the assault took place. He had no reason to suspect that Spriggs' trial testimony would materially differ from his statement. Counsel acted reasonably under the circumstances.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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